Supreme Court, U.S.
FILED
JUL 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1930

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARTIN D. MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF

MORRIS D. DAVIS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
Headquarters, United States Air Force
Bolling Air Force Base
Washington, D.C. 20332-6128

QUESTION PRESENTED

Whether evidence was introduced against petitioner in violation of an Air Force regulation that supplies a servicemember with a limited form of immunity for statements he makes about prior drug use when he voluntarily presents himself for admission into a drug rehabilitation program.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	9

TABLE OF AUTHORITIES

Statutes and regulations:

Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 31, 10 U.S.C. 831	5
Art. 86, 10 U.S.C. 886	1-2
Art. 112a, 10 U.S.C. 912a (Supp. V 1987)	2
Air Force Reg. 30-2 (June 22, 1981)	2, 6, 7, 8, 9
Para. 4-3d	2-3
Para. 4-3d(1)	4
Para. 4-3d(1)(A)	2
Para. 4-3d(3)(B)	4, 7
Interim Message Change 83-2 (Dec. 22, 1981)	2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1930

MARTIN D. MARTINEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-8a) is reported at 28 M.J. 56. The opinion of the Air Force Court of Military Review (Pet. App. 9a-12a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on April 3, 1989. The petition for a writ of certiorari was filed on May 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Air Force, was convicted at a general court-martial of being absent without leave for two periods, in violation of Article 86 of

the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 886, and of the wrongful use of cocaine on or about May 12, 1986, in violation of Article 112a of the UCMJ, 10 U.S.C. 912a (Supp. V 1987). Petitioner was sentenced to three months' confinement, restriction to base for two months, a bad conduct discharge, forfeiture of $426 pay per month for four months, and a reduction in rank. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed petitioner's conviction. The Court of Military Appeals affirmed.

1. The Air Force operates a drug rehabilitation program in order to encourage narcotics addicts and other drug users voluntarily to seek professional help to overcome their addiction. In order to qualify for the program, a servicemember must voluntarily reveal the nature and extent of his drug problem to his unit commander, his first sergeant, personnel of the Social Actions Unit, or medical personnel before he becomes suspected of (or is charged with) narcotics use. Air Force Reg. 30-2, Personnel, Social Actions Program, para. 4-3d(1)(A) (June 22, 1981), as amended by Interim Message Change 83-2 (Dec. 22, 1982).[1] The servicemember's commanding officer is re-

---

[1] The regulation in effect at the time of the relevant events provided in part:

> 4-3. **Identification and Drug and Alcohol Abuse Control Evaluation (DAAEP) Process:**
>
> d. **Self Identification.** Personnel with drug or alcohol problems are encouraged to seek assistance. Air Force members concerned about a drug or alcohol problem may refer themselves for the evaluation process. Personnel in this status must complete the DAAEP to assess the scope of their problem. Following the DAAEP a Rehabilitation Committee will recommend an appropriate course of action to the commander.
>
> (1) Under the conditions specified below, an Air Force member's voluntary submission to an Air Force Treatment

sponsible for deciding whether to admit him into the program. Tr. 50-51, 54. Statements made by a servicemember regarding his drug use "prior to the disclosure" cannot be

---

and Rehabilitation Program, and self-disclosed evidence of prior personal drug use or prior possession of drugs for personal use voluntarily disclosed by the member as part of the first entry into such programs, may not be used against the member in disciplinary action under the UCMJ or to characterize an administrative discharge:

(A) Members voluntarily reveal the nature and extent of their drug involvement to their unit commander, first sergeant, social actions personnel or medical personnel before they are apprehended, placed under investigation for drug abuse, ordered to give a urine sample under para 4-2d(1)(A), (B), (D) above, or advised of a recommendation for administrative separation for drug abuse; and

(B) Members identify themselves with the intention of receiving rehabilitation; and

(C) Members are determined to have a substantiated drug abuse problem (as explained in para 3-3c(7)).

(2) Members are considered under investigation when the appropriate initial case entry is made in a security police blotter or the security police investigator's log of cases, or when a commander has requested (either in writing or verbally) an investigation according to AFR 124-4.

(3) The limitations of para 4-3d(1) apply only to the member's self-disclosed personal use of drugs or possession of drugs for personal use which occurred prior to the disclosure. The limitations do not apply to:

(A) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been introduced by the member; and

(B) Disciplinary or other action based on independently derived evidence, including evidence of drug abuse after the member's first entry into the Drug Treatment and Rehabilitation Program.

used against him in criminal proceedings under the Uniform Code of Military Justice or in order to characterize an administrative discharge as being on less than honorable conditions. Air Force Reg. 30-2, para. 4-3d(1); Tr. 55. The regulation also expressly provides, however, that the safe harbor it establishes does not apply to "evidence of drug abuse after the member's first entry into the Drug Treatment and Rehabilitation Program." Air Force Reg. 30-2, para. 4-3d(3)(B). The question in this case is whether evidence was admitted at petitioner's court-martial in violation of that regulation.

2. Petitioner was absent from his unit without leave (AWOL) from May 7 to 12, 1986. Initial efforts to locate petitioner proved unsuccessful. On May 11, petitioner placed a telephone call to one of his co-workers, Airman Gregory Foster. Tr. 37. Petitioner told Foster that he had been using cocaine in order to cope with the pressure of his workload. Tr. 38, 40. Foster suggested that petitioner speak with the Area Defense Counsel and enroll at the Social Actions Office. May 11 was a Sunday and the offices were unstaffed, so petitioner and Foster decided to meet at the Area Defense Counsel's office the next morning. *Ibid.* Foster also told petitioner that Sergeant Newberry, their Flight Chief, wanted petitioner to call him. Tr. 39; Pet. App. 1a-2a, 10a.

That evening, after petitioner had spoken with Foster, Sergeant Gregory Haney, petitioner's supervisor, stopped by petitioner's apartment. Petitioner told Haney that he had spoken with Foster and that he was going to turn himself in the next day at the Social Actions Office, because he had personal and drug problems. Tr. 59, 65-66. After Haney left, petitioner called Sergeant Newberry and told Newberry that he had been using cocaine and that he was going to turn himself in the next day to the Social Actions Office. Pet. App. 1a-2a.

The following morning, May 12, Newberry told petitioner's first sergeant, Sergeant John Brewer, about his conversation with petitioner. Tr. 97-98. Sergeant Brewer then called the Social Actions Office and spoke with Staff Sergeant Ledora McDougle, a drug and alcohol counselor. Brewer informed McDougle that petitioner was likely to report to the Social Actions Office that day, and Brewer asked McDougle to notify him when petitioner arrived. Tr. 98-99, 127-128; Pet. App. 2a, 10a.

Petitioner did not meet Foster Monday morning at the Area Defense Counsel's office as they had planned. Tr. 40-41. As a result, Sergeant Haney went to petitioner's apartment and found petitioner asleep in bed at 11 or 11:30 a.m. Tr. 60. Haney drove petitioner to the Social Actions Office, where they met Sergeant McDougle. Tr. 60. Sergeant McDougle then notified Sergeant Brewer that petitioner had arrived. Tr. 128. When Brewer arrived at the Social Actions Office, he asked petitioner if petitioner was willing to provide a urine sample for drug testing. Tr. 100, 129. Petitioner agreed to do so, and he went to the base hospital, where a urine sample was collected. Tr. 100. Afterward, petitioner returned to the Social Actions Office, where he was questioned by Sergeant Brewer after being advised of and waiving his rights under Article 31 of the UCMJ, 10 U.S.C. 831. Petitioner admitted that he had been using cocaine. Tr. 100-101. Sergeant Brewer then transported petitioner back to the base hospital, where he was examined by a psychiatrist, who ordered a urine toxicology screen, a test designed to detect narcotics. Tr. 20, 102-104. Petitioner, however, left the hospital before providing the second urine sample. Tr. 22. That night petitioner again used cocaine. Tr. 145-146; Pet. App. 2a-3a.

Before leaving petitioner at the hospital, Sergeant Brewer instructed petitioner that he was to report for duty

the following morning, May 13, at 7:30 a.m. Tr. 104-105. The next day, however, petitioner went AWOL again. On May 14, concerned that petitioner might commit suicide, Foster and McDougle went to petitioner's apartment to return him to the base. Tr. 41-42, 130-131. While en route, petitioner said that he had used cocaine on May 12. Tr. 132. Petitioner's commander then decided to place petitioner in confinement. As part of the confinement process, petitioner was physically examined by Lieutenant George Roose, a physician's assistant. During the examination, petitioner said that he had used cocaine on May 12. Tr. 146. Roose also noticed needle marks on petitioner's arms. AX 4. A medical urinalysis was undertaken to examine petitioner's urine for drugs. The urinalysis tested positive for the presence of cocaine. Tr. 136-137, 146.

3. Before trial, petitioner moved to suppress his statements and all physical evidence obtained by the government after he sought to enroll in the drug rehabilitation program. AX 1. Petitioner claimed that he was "self-identifying himself" on May 12, and that any evidence thereafter obtained by the government was subject to suppression under Air Force Reg. 30-2. AX 1, at 1-2. The parties agreed to consolidate the suppression hearing with the trial, see Tr. 67, and, after hearing evidence, the trial judge denied petitioner's motion. Tr. 144-147. The judge concluded, inter alia, that petitioner's May 12 drug use was not protected by Air Force Reg. 30-2, and that petitioner's statements about that use and the urinalysis performed on May 14 therefore were not subject to suppression under the regulation. Tr. 147. Based on the evidence admitted at the suppression hearing, the judge found petitioner guilty of twice being AWOL and of using cocaine "about" May 12. Tr. 149-150.

ARGUMENT

Petitioner challenges only his narcotics conviction and not his AWOL convictions. Petitioner contends that evidence was admitted at trial in violation of Air Force Reg. 30-2. That fact-bound claim does not warrant further review.

Air Force Reg. 30-2 supplies a limited form of immunity to servicemembers who voluntarily come forward to obtain assistance in overcoming drug use if they meet and comply with the provisions of the regulation. A servicemember is given immunity for information he reveals concerning drug use prior to the time he comes forward for help. Subsequent drug abuse is not protected, and a servicemember's statements about subsequent drug use are not entitled to immunity.

Those rules were not violated in this case. Although petitioner was originally charged with using cocaine from October 1, 1985, through May 14, 1986, the trial judge only found petitioner guilty of using cocaine on the evening of May 12, 1986, which occurred after petitioner had sought the assistance of the Social Actions Office. Tr. 147, 149-150. Moreover, the evidence that was used to establish petitioner's guilt of that offense—his remarks to Sergeant McDougle and Lieutenant Roose on May 14, and the test results of the urinalysis conducted on that date—related to drug use that was not "prior" to petitioner's arrival at the Social Actions Office. See also Air Force Reg. 30-2, para. 4-3d(3)(B) ("independently derived evidence" is not subject to immunity). Accordingly, the Court of Military Appeals correctly held that petitioner's conviction was supported by evidence that was not subject to exclusion under Air Force Reg. 30-2. Pet. App. 7a.

Petitioner contends that, because Sergeants McDougle and Brewer did not formally admit him into the drug re-

habilitation program and advise him about the limited immunity afforded by Air Force Reg. 30-2, he "was never truly entered into the program," and the exclusion in that regulation of statements made by a servicemember about post-admission drug use should not apply. Pet. 9-11. That argument is meritless. Sergeants McDougle and Brewer did not formally admit petitioner into the program,[2] but petitioner does not claim (and the evidence does not suggest) that they or anyone else misled him into believing that he was free to use cocaine after arriving at the Social Actions Office on May 12. Accordingly, petitioner had no reason to believe that he could use cocaine that evening, or that his later admissions that he did (as well as the urinalysis performed on May 14) could not be used against him at a court-martial.

---

[2] As noted above, only petitioner's commanding officer could have formally admitted petitioner into the drug rehabilitation program. Petitioner criticizes Sergeant McDougle for not admitting petitioner into the drug rehabilitation program at the first opportunity on May 12. Pet. 9. That criticism is misdirected, because petitioner was largely responsible for any such failure. Petitioner had assured Foster that petitioner would meet him at the Area Defense Counsel's Office on the morning of May 12 to enter the rehabilitation program. Instead, Haney found petitioner asleep at home at 11 or 11:30 a.m., and petitioner spent the bulk of the remainder of the day at the hospital. Petitioner left the hospital at approximately 5 p.m., Tr. 75, and by that time duty hours were over. (In the Air Force duty hours generally run from 7 or 7:30 a.m. to 4 or 4:30 p.m. Most offices are not staffed after duty hours end.) Petitioner also criticizes Sergeant McDougle for not advising him of the provisions of the program, Pet. 9, but Air Force Reg. 30-2 does not require that a servicemember be told that he cannot continue to use drugs. Finally, petitioner complains that he was interrogated by Sergeant Brewer at the Social Actions Office during the day on May 12. But petitioner was convicted of using cocaine *after* the interrogation. Thus, any questioning of petitioner by Sergeant Brewer is immaterial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOE R. LAMPORT
Col., OJAG, USAF

ROBERT E. GIOVAGNONI
Lt. Col., OJAG, USAF

MORRIS D. DAVIS
Capt., OJAG, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division

JULY 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00343